(26,272)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 805.

L. G. CALDWELL AND J. A. DUNWODY, COPARTNERS, TRADING AS CALDWELL AND DUNWODY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

Byron S. Adams & Detweiler (Inc.), Printers, Washington, D. C., December 29, 1917.

1 Court of Claims.

No. 32439.

L. G. CALDWELL and J. A. DUNWODY, Copartners, Trading as CALDWELL AND DUNWODY,

vs.

THE UNITED STATES.

I. *Proceedings Had in Case Before Final Hearing.*

The claimants filed their original petition herein on March 22, 1913.

On August 21, 1913 the defendant filed a demurrer to said petition.

On March 6, 1917 the demurrer was argued and submitted.

On March 19, 1917 the demurrer was sustained, with leave to claimants to amend their petition within sixty (60) days, with an opinion by Judge Barney.

On April 30, 1917 the claimants filed their amended petition, which is as follows:

2 II. *Amended Petition.*

Filed April 30, 1917.

To the Honorable Chief Justice and Judges of the Court of Claims:

The amended petition of L. G. Caldwell and J. A. Dunwody respectfully represents:

I.

The petitioners are citizens of the United States and during all of the year 1906 were, and ever since have been, citizens and bona fide residents of the State of Colorado.

II.

By virtue of the Act of Congress entitled "An Act authorizing the citizens of Colorado, Nevada, and the Territories, to fell and remove timber on the public domain for mining and domestic purposes," approved June 3, 1878 (20 Stat., 88), the petitioners were authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public mineral lands in said State of Colorado.

3 III.

And by virtue of the Act of Congress entitled "An Act to amend section eight of an act approved March 3, 1891, entitled 'An Act to

repeal timber-culture laws and for other purposes,'" approved March 3, 1891 (26 Stat., 1093), the petitioners were authorized and entitled to cut and remove from the public timber lands, timber for use in said State of Colorado, for agricultural, mining, manufacturing, or domestic purposes.

IV.

On January 4, 1906, the petitioners were appointed timber agents of the Denver, Northwestern and Pacific Railway Company for the purpose of cutting and manufacturing railroad ties from timber on public lands adjacent to the line of railroad then under construction by said company in Grand County, Colorado, under authority of the Act of Congress of March 3, 1875, granting right of way for railroads through the public domain and authorizing the taking of timber from public lands for construction purposes.

V.

The manufacture of railroad ties from growing timber leaves tops of the trees cut for the purpose and small trees cut in making necessary roads, all known as tie slash, which can be cut up into posts, poles, mine props, etc., and in adjusting the compensation to be paid the petitioners by said railway company for their services in cutting, manufacturing and delivering such railroad ties, the amount to be realized by the petitioners from the utilization and sale of
4 the tie slash from the trees to be cut was estimated and regarded and a rate of compensation per railroad tie agreed upon less than would otherwise have been fixed, and it was understood and agreed between the petitioners and said railway company that the petitioners should be entitled to and have such tie slash, and under the laws of the United States the petitioners were entitled thereto.

VI.

Thereafter, and prior to October 10, 1906, the petitioners manufactured and delivered to said railway company 88,787 railroad ties cut from growing timber on public land in townships 2 South, Range 75 West, and 2 South, Range 76 West, of the 6th Principal Meridian adjacent to the line of said railway company's railroad, and designated for the purpose by the Commissioner of the General Land Office through his subordinate, the chief of field division at Denver in said State, which said ties, as the petitioners are informed and believe, were used by the said railway company in the construction of its said railroad; and that the said cutting of timber for the manufacture of the said ties left a large amount of tie slash severed from the realty.

VII.

The petitioners are informed and believe that all of the said lands from which growing timber was cut as aforesaid, were public non-mineral timber lands, but the petitioners are advised, and therefo

aver, that whether the said lands were mineral or non-mineral in character, petitioners, under the said acts of March 3, 1875, June 3, 1878, and March 3, 1891, or one or more of them, became entitled to the said tie slash and, after the same was severed from the realty as aforesaid, were the owners thereof.

5

VIII.

On October 10, 1906, the petitioners received the following letter of authority from the Chief of Field Division of the General Land Office:

"DENVER, COLO., Oct. 10, 1906.

"Caldwell & Dunwody, Arrow, Colo.

"SIR: As per instructions of the Commissioner of the General Land Office, you are hereby granted authority as agent of the Denver, Northwestern & Pacific Railway, to cut timber under Act of Congress of March 3, 1875, upon the public lands, to sell and dispose of tops and lops of trees that you may cut for construction of said road, which cannot be used by said road for construction purposes.

"Before selling the same you must inquire of the proper officers of the said Denver, Northwestern & Pacific Railway if they will purchase said tops and lops that you may have on hand.

"You must also carefully pile the brush so as to avoid danger of destruction of public timber by forest fires, as heretofore instructed. You will report to this office from time to time the character and amount of timber sold under this authority, and to whom sold.

"I herewith quote the instructions to this office from the Commissioner of the General Land Office:

"'It is incumbent upon your office to see to it that all contractors employed by the said R. R. Co. shall cut timber strictly in accordance with the rules and regulations; they shall confine their cutting strictly to such timber as is needed by the railroad company, and such "refuse" as results from such cutting may be disposed of by the railroad company or by the contractors without violation of existing law.

"'Where it is found that a contractor has violated the law
6 in that he has cut or sold timber other than that described above, prompt and effective action should be taken on your part to the extent of requiring the railroad company to nullify his contract, or to notify the railroad company that you will no longer recognize his agency and thereafter proceed against him as in ordinary cases of timber trespass.'

Very respectfully,

(Signed) N. J. O'BRIEN,

"Chief Field Division, G. L. O."

IX.

Upon the faith of said letter of authority and the verbal assurance of said Chief of Field Service that they were entitled to the said tie slash theretofore cut (and the petitioners are advised that under the laws aforesaid they were entitled to the same and were the owners

thereof), the petitioners on the same day entered into a further contract with said railway company to manufacture and deliver to said railway company 150,000 additional railroad ties to be cut from said public lands in said two townships adjacent to the line of said railroad, the compensation of the petitioners being fixed and agreed upon at a low rate per tie with the understanding that the petitioners were, and would be, the owners of the slash from such tie cutting theretofore done and thereafter to be done and have the benefit of the salvage therefrom.

X.

Thereafter and during the fall and early winter of 1906 the petitioners, pursuant to said second contract with said railway company, manufactured and delivered to said company 132,428 ties cut from growing timber on public lands in said two townships adjacent to the line of said railroad, and said ties, as petitioners are informed and believe, were used by the said railroad company in the construction of its said line.

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XI.

The cutting of timber for the manufacture of said last mentioned ties left a further large amount of tie slash severed from the realty and the petitioners are advised, and therefore aver, that under the laws aforesaid they had become entitled to the same and were the owners thereof.

XII.

On December 17, 1906, the petitioners agreed to sell to the Fraser River Timber Company, of Denver, Colo., a large amount of such tie slash remaining from the cutting and manufacture of the said two lots of railroad ties, and also entered into a contract with the Leyden Coal Company, of Denver, Colo., to furnish 200 cars of mini-g props to be cut from such tie slash not sold to the said Fraser River Timber Company, giving to each of said purchasers a substantial bond to guarantee delivery, and the petitioners aver that the said Fraser River Timber Company and the said Leyden Coal Company so agreed to purchase said tie slash, or the product thereof, for the purpose of using the same in the said State of Colorado, and that the petitioners intended to utilize the remainder of said tie slash, if any, for the purposes mentioned in the said Acts of 1878 and 1891 and in said State of Colorado.

XIII.

The petitioners cut some of said tie slash into poles on the ground, but by reason of heavy snow during the winter the same could not be gotten out for delivery, and all of said tie slash, whether cut into poles or not, was left on the ground to be handled in the spring.

8

XIV.

Before the snow melted so as to enable the petitioners to resume operations, the land upon which the said ties had been cut was, by

Presidential Proclamation of March 2, 1907, included in the Medicine Bow National Forest. Thereafter the petitioners resumed the cutting of such tie slash into mine props in order to perform their contract with said Leyden Coal Company, and the Fraser River Timber Company attempted to take possession of the portion of such tie slash agreed to be sold to them by the petitioners, but both the petitioners and the said Fraser River Timber Company were stopped by the officers of the Forest Service of the United States, which took the position that the said tie slash belonged to the United States and came under the jurisdiction of the said Forest Service, and that the petitioners had no right or title in or to the same.

XV.

Thereafter the officers of the said Forest Service permitted the petitioners to have and remove the poles which the petitioners had theretofore manufactured from such tie slash and also to have all of the tops and refuse on a so-called fire guard of a width of 250 feet from said railroad extending for a distance of two miles, an area of only about 125 acres, whereas the operations of the petitioners had extended over an area of approximately 3,000 acres. Beyond said previously manufactured poles and the said tie slash on the said so-called fire guard, the officers of said Forest Service, over the protest of the petitioners, refused to allow the petitioners to have any of said tops, or refuse, but took possession of the same and proceeded to and did sell and dispose of them to various persons, the proceeds of which sales were received by the United States through its said officers of said Forest Service and covered into its Treasury.

9 VI.

The petitioners have no knowledge as to the amount received by the United States from the sales so made of said tie slash by the officers of said Forest Service, and under the laws of the United States the officers of the United States are prohibited from giving such information, and such information can be obtained only through the process of this honorable court, but the petitioners aver that the value of said tie slash so taken and disposed of by the officers of said Forest Service was and is $26,454.90.

VII.

The petitioners heretofore applied to the said Forest Service of the United States for reimbursement or payment to them, the petitioners, of all sums received by the United States from the sale of said tie slash to which the petitioners were entitled and of which they were deprived by the said Forest Service, but such application was denied by the Forester under date of December 8, 1910.

VIII.

The premises considered, the petitioners pray judgment against the United States in this behalf for the sum of $26,454.90, or such

other sum as may be found to be the amount received by the United States from the sale of said tie slash by the officers of said Forest Service.

CALDWELL & DUNWODY.
By L. G. CALDWELL.

CLARK, PRENTISS & CLARK,
Attorneys for Claimants.

10 STATE OF COLORADO,
City and County of Denver, ss:

L. G. Caldwell, being duly sworn, deposes and says that — is one of the claimants mentioned in the foregoing petition by him subscribed; that he has read the said petition and knows the contents thereof and that the matters and things therein set forth are true to the best of his knowledge and belief.

L. G. CALDWELL.

Subscribed and sworn to before me this 12th day of April, A. D. 1917.

[SEAL.] WILLIAM B. RODDA,
Notary Public.

11 III. *Demurrer to Amended Petition.*

Filed June 5, 1917.

The defendant, by its Attorney General, demurs to the amended petition filed in this cause on the 30th day of April 1917, upon the following grounds:

First. That the court has not jurisdiction of the action.

Second. That the amended petition does not state facts sufficient to constitute a cause of action.

HUSTON THOMPSON,
Assistant Attorney General.
RICHARD P. WHITELEY,
Assistant Attorney.

IV. *Argument and Submission of Demurrer.*

On October 29, 1917 the defendant's demurrer to the claimants' amended petition was argued by Mr. Richard P. Whiteley, for the defendant, and Mr. William C. Prentiss, for the claimants, and the demurrer was submitted.

12 V. *Opinion of the Court.*

Filed December 3, 1917.

BARNEY, *Judge*, delivered the opinion of the court:

The question for decision in this case arises from the demurrer of the defendants to the amended petition herein of the plaintiffs.

A demurrer was interposed to the original petition, which was sustained by this court with an opinion March 19, 1917. As the amended petition contains all of the averments of the original petition and more, the opinion on the first demurrer will be withdrawn and this opinion stand as the opinion upon both demurrers.

The facts set forth in the petition as amended are substantially as follows: The plaintiffs, in June, 1906, were the timber agents of the Denver, Northwestern & Pacific Ry. Co., for the purpose of cutting and manufacturing railroad ties on the public lands adjacent to the line of said railway then under construction in Colorado to be used and which were used in the construction of said railway under the authority of the act of Congress of March 3, 1875 (18 Stat., 482). As a part of the consideration for the labor of cutting and manufacturing said ties said railway company agreed to give to the plaintiffs all the tops or "tie slash" of the trees cut down for that purpose. Pursuant to said contract and prior to October, 1906, the plaintiffs manufactured and delivered to said railway company 88,797 ties, leaving a large amount of said tie slash. On October 10, 1906, the plaintiffs received the following letter from an officer of the General Land Office:

"DENVER, COLO., Oct. 10, 1906.

"Caldwell & Dunwody, Arrow, Colo.

"SIR: As per instructions of the Commissioner of the General Land Office, you are hereby granted authority as agent of the Denver, Northwestern & Pacific Railway to cut timber under act of Congress of March 3, 1875, upon the public lands, to sell and dispose of tops and lops of trees that you may cut for construction of said road, which can not be used by said road for construction purposes.

13 "Before selling the same you must inquire of the proper officers of the said Denver, Northwestern & Pacific Railway if they will purchase said tops and lops that you may have on hand.

"You must also carefully pile the brush so as to avoid danger of destruction of public timber by forest fires, as heretofore instructed. You will report to this office from time to time the character and amount of timber sold under this authority, and to whom sold.

"I herewith quote the instructions to this office from the Commissioner of the General Land Office:

" 'It is incumbent upon your office to see to it that all contractors employed by the said R. R. Co. shall cut timber strictly in accordance with the rules and regulations; they shall confine their cutting strictly to such timber as is needed by the railroad company, and such "refuse" as results from such cutting may be disposed of by the

railroad company or by the contractors without violation of existing law.

"'Where it is found that a contractor has violated the law in that he has cut or sold timber other than that described above, prompt and effective action should be taken on your part to the extent of requiring the railroad company to nullify his contract, or to notify the railroad company that you will no longer recognize his agency and thereafter proceed against him as in ordinary cases of timber trespass.'

"Very respectfully,

"(Signed) N. J. O'BRIEN,
"Chief Field Division, G. L. O."

Thereafter the plaintiffs entered into a further contract with said railway company to cut and manufacture for it additional ties upon the public lands on the same terms as above stated and under which latter contract they did manufacture and deliver to said railway company a considerable number of ties which were also used in the construction of said railway, leaving a further amount of tie slash. In December, 1906, the plaintiffs agreed to sell to the Fraser River Timber Company, of Denver, Colo., a large amount of said tie slash; also to sell to the Leyden Coal Company, of the same place, 200 cars of mining props, the same to be cut by the plaintiffs from said tie slash, all the tie slash so sold to be used in the State of Colorado.

The plaintiffs also aver that they intended to utilize the remainder of said tie slash for purposes mentioned in the acts of 1878 and 1891 hereinafter quoted.

March 2, 1907, the land upon which said ties had been cut was, by presidential proclamation, included in the Medicine Bow National Forest. Thereafter the officers of the Forest Service allowed the plaintiffs to remove the poles which they had already cut from said tie slash together with the tie slash on a so-called "fire yard" 200 feet wide along said railway for a distance of two miles, but refused to allow them the remainder of said tie slash, but took possession of the same, sold it, and the proceeds were covered into the United States Treasury. This suit is brought to recover the sum of such proceeds.

The defendants demur to the petition upon the grounds (1) that this court is without jurisdiction, (2) that the petition does not state the cause of action.

The jurisdiction of this court is attacked upon the ground that the facts alleged show, if they show any cause of action at all
14 (which is denied), it is in tort and not upon contract either express or implied.

That money belonging to a citizen which has reached the United States Treasury, whether through the trespass and wrongdoing of an officer of the United States or not, can be recovered in this court was decided by this court in Thayer v. United States, 20 C. Cls., 137. The same question arose in The State Bank v. United States, 10 C. Cls., 519, where the same doctrine was held, and was affirmed by the Supreme Court on appeal. 96 U. S., 30.

These cases would seem to settle the question of jurisdiction, but

as the demurrer is sustained upon other grounds it is not necessary to decide that qestion. Hence the question here decided is whether the plaintiffs ever had any title to the tie slashings in question, for if not, of course they never had any right to the proceeds, wherever they may be. The railway company, through its agents, cut and manufactured the ties under the right conferred by the act of March 3, 1875, supra, which provides:

"That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road material, earth, stone, and timber necessary for the construction of said railroad." * * *

The plaintiffs argue that the grant to the railway of timber for construction purposes carried the right to the whole tree when cut down though only a part of it may be used for railroad construction. Such a construction of the statute would open the door to many abuses. The railway might slash down all of the valuable timber along its right of way, use a trifling part of it for its construction, and sell the remainder. If needed for that purpose, the railway could have used the tie slash in its further construction, but we think it acquired no title to the same for the purpose of traffic. The same became liable to be appropriated for certain purposes by citizens of the State of Colorado under another statute, which will be hereafter quoted and construed.

Statutes granting privileges or relinquishing rights of the public are to be strictly construed against the grantee. Wisconsin Central Ry. v. United States, 164 U. S., S. C., 27 C. Cls., 440. Nothing passes by the grant but what is conveyed in clear and explicit language United States v. Oregon, etc., Ry., 164 U. S., 529. As a further example of the strict construction to be given to this statute, we refer to the case of United States v. Denver, etc., Ry., 150 U. S., 1, where it is said:

"This court does not mean to be understood as holding that the defendant under the act of 1875 has the right to use the timber taken from the public lands for the purpose of constructing rolling stock or equipment employed in its transportation business."

This question came before the court in the case of United States v. Denver, etc., Ry. Co., 190 Fed. Rep., 825, 826, and it was there held that the railway company acquired no title to such tops, and we think the doctrine therein announced was sound. Under this decision the said railway company never acquired any title to the tie slash in question, and hence could not confer any on the plaintiffs.

But the plaintiffs rely upon the letter quoted from an officer of the Land Office, in effect making a gift to them of the same. We do not think such officer had any authority to bestow such gift. It has been repeatedly held by this and other courts that, unless expressly authorized thereto by Congress, no officer of the United States has

authority to give away the property of the Government. Steel v. United States, 113 U. S., 128; Flores v. United States, 18 C. Cls., 352.

It would indeed lead to favoritism and rank injustice if an officer of the Land Office could select parties who should receive timber upon the public domain, for if he could exercise such discrimination as to this tie slash he could exercise the same discrimination as to standing timber to which certain citizens are entitled as provided under another statute about to be quoted.

To maintain their title to the tie slash in question the plaintiffs further rely upon the act of March 3, 1891, 26 Stat., 1095, 1099, which provides as follows:

"And in the States of Colorado, Montana, Idaho, North Dakota and South Dakota, Wyoming, and in the District of Alaska and the gold and silver regions of Nevada, and the Territory of Utah, in any criminal prosecution or civil action by the United States for a trespass on such public timberlands or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timberlands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes, and has not been transported out of the same." * * *

Under this act it was clearly never intended to give citizens the right to traffic in the timber upon the public lands, no matter what use may have been the purpose to make of it. This act was construed by Assistant Attorney General Van Devanter, now Justice of the Supreme Court, in an opinion to the Secretary of the Interior November 27, 1899, in volume 29, Decisions of the Department of the Interior relating to Public Lands, page 322. He said:

"There is nothing in this act which suggests that it was the purpose of Congress to thereby authorize or provide for the sale of timber on the public lands. As gathered from a careful examination of the terms of the act, its purpose seems to have been to modify the law relating to the cutting and removal of timber from lands of the United States by denying to the Government the right then existing to demand a conviction in the criminal prosecution, or a recovery in a civil action when in any of the States, Territories, or regions named, timber is cut or removed from the public timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under the rules and regulations made and prescribed by the Secretary of the Interior, and is not transported out of that State or Territory. * * *

"I am of the opinion that the legislation under consideration does not authorize the sale of timber, and inasmuch as the regulations of March 17, 1898, supra, provide for sales thereof, I advise that

16 said regulations be reformed and brought within the authority given the Secretary of the Interior by the statute under which they were prescribed."

In accordance with this opinion the Secretary of the Interior issued rules and regulations governing the appropriation of timber under this act, as he was authorized to do by its terms and, among other things, directed that "the cutting or removal of timber or lumber to an amount exceeding stumpage value of $50 in any one year will not be permitted except upon application to the Secretary of the

Interior and after the granting of a special permit." This opinion and these regulations will show the absurdity of maintaining that under this statute the plaintiffs could acquire title to timber of the value of $26,454.90, which is the value placed by the plaintiffs upon the tie slash, the possession of which they were deprived, and acquire the title for the purpose of selling it to other parties.

It should be here remarked that said act of March 3, 1891, contains a provision that "nothing herein contained shall operate to enlarge the rights of any railway company to cut timber upon the public domain."

The act of June 3, 1878, does not enter into the discussion of this case, as it is averred in the petition that the timber in question was cut on nonmineral land, and the act is applicable solely to public mineral lands; and also expressly provides that it shall not extend to railroad corporations.

It is unnecessary to proceed further with the discussion of this branch of the case, as it is clear that the plaintiffs must rely alone upon their rights acquired from the railroad company under the act of 1875.

It follows from the foregoing that the demurrer to the petition as amended should be and the same is hereby sustained and the petition dismissed.

Hay, Judge; Downey, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

17 VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Third day of December, A. D., 1917, it was ordered that the demurrer to the claimants' amended petition be sustained, and that the amended petition of the claimants, L. G. Caldwell and J. A. Dunwody, Copartners trading as Caldwell and Dunwody, be and the same is hereby dismissed.

BY THE COURT.

VII. *Claimants' Application for and Allowance of Appeal.*

Come now the claimants, by their attorneys, and make application to the Court for the allowance of an appeal to the Supreme Court of the United States from the decree of this court dismissing the petition herein, and, as cause, show that the amount involved in the cause is more than three thousand dollars.

CLARK, PRENTISS & CLARK,
Attorneys for Claimants.

Filed December 11, 1917.

Ordered: That the above appeal be allowed as prayed for.

BY THE COURT.

December 11, 1917.

18 In the Court of Claims.

No. 32439.

L. G. CALDWELL and J. A. DUNWODY, Copartners, Trading as CALDWELL AND DUNWODY,

vs.

THE UNITED STATES.

I, Sam'l A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the opinion of the Court; of the judgment of the Court; of the claimants' application for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims at Washington City this Thirteenth day of December, A. D. 1917.

[Seal Court of Claims.]

SAMUEL A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,272. Court of Claims. Term No. 805. L. G. Caldwell and J. A. Dunwody, copartners, trading as Caldwell & Dunwody, appellants, vs. The United States. Filed December 27th, 1917. File No. 26,272.